IN THE

# Supreme Court of the United States

OCTOBER TERM, 1959

No.

PUERTO RICO DRYDOCK & MARINE TERMINALS, INC.,
*Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Puerto Rico Drydock & Marine Terminals, Inc., petitions for a writ of certiorari to review the judgment of the Court of Appeals for the District of Columbia Circuit entered in this case on June 9, 1960. By a divided court, the court below affirmed a decision of the National Labor Relations Board which reversed the findings of a trial examiner.

## OPINIONS BELOW

The order of the Court of Appeals (Appendix, *infra*, pp. 1a-9a) is not officially reported. The intermediate report of the trial examiner, and the decision and order of the Board which reversed the trial examiner (R. 6-57)[1] are reported at 123 NLRB 1298.

## JURISDICTION

The judgment of the Court of Appeals was entered on June 9, 1960. The jurisdiction of this court is invoked under 28 U.S.C. 1254 (1).

## QUESTIONS PRESENTED

1. Is the mandate of this Court in *Universal Camera Corporation* v. *National Labor Relations Board*, 340 U.S. 474, respected by a decision of the National Labor Relations Board which reversed a trial examiner's report in purported reliance on isolated portions of the record, where such reversal is based solely on crediting the testimony of witnesses discredited by the trial examiner and on discrediting the testimony of witnesses credited by the trial examiner, without taking into account or making any mention whatever of the clear preponderance of all the revelant evidence on the record as a whole supporting the trial examiner's report?

2. In an establishment employing approximately 100 employees, all of whom refuse to pay the initiation fee and dues required under a concededly valid union shop agreement, does the employer commit an unfair labor practice in discharging eleven of such employees

[1] References designated "R" are to the pages of the printed Joint Appendix which was the record before the court below.

at the union's request where the union selected these eleven employees because they not only refused to pay but fraudulently and effectively counselled and advised all the others not to pay, where discharging the others would lead to a complete shutdown of the establishment and the discharge of the eleven employees had the effect of promptly inducing all the others to pay?

## STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are as follows:

### Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

### Unfair Labor Practices

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: Provided,

That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; * * *

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership * * *

## Evidence; Enforcement and Review of Board Orders

Sec. 10(e) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: Provided, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: And provided further, That in determining whether a complaint shall issue alleging a violation of section 8(a)(1) or section 8(a)(2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is

affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

* * * * * *

SEC. 10(e) The Board shall have power to petition any United States court of appeals, or if all the United States courts of appeals to which applications may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such persons resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon

such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

Sec. 10(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part

the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

## STATEMENT

On April 9, 1956, the Petitioner entered into a collective bargaining agreement with the International Longshoremen's Association (the Union) effective from April 1, 1956 to December 31, 1958. The union shop clause required employees covered by it to remain members of the contracting union as a condition of employment (R. 342). The Union had been certified by the Board as the exclusive bargaining representative of the Petitioner's employees (R. 61).

The validity of the agreement, including the union shop clause, is conceded, as is also the fact that the

union shop clause applied to the employees in question (R. 31).

Administration of the agreement was given over by the I.L.A. District Council which held the Board certificate, to its Local 1575, which took over the affairs and membership of Local 1674 in 1954 upon the latter's dissolution (R. 67, 68). The check off, as stated, was in favor of the I.L.A. District Council for a per capita levy on each employee (R. 291), not any local union, but this did not detract from the employees' obligation to pay dues to the local union (R. 293). After the dissolution of Local 1674 the employees failed for a period of about two years to pay dues to any local union, including Local 1575 (R. 31, 72). Being in default in the payment of dues for a period in excess of six months, they lost their membership in Local 1575 (R. 73), and were required by the constitution and by-laws of the Union to pay an initiation fee of $75.00 and current dues to fulfill the requirements of the union shop clause (R. 33, 73).

In disregard of their obligation to abide by the agreement, which their duly designated bargaining representative had properly executed, and notwithstanding that employees Falu Rosario and Miguel Rivera Amariles had participated in the negotiations which led up to the agreement (R. 237-283; 309), these two employees and their associates determined to refuse to pay their union dues and to advise all the other employees to do likewise. For this purpose they sought the assistance of a rival union (R. 133), induced approximately 100 employees to revoke their written per capita check-off authorization in favor of the District Council (R. 135), purported to designate the rival union as their bargaining representative

(R. 138) and "rejected" the agreement (R. 139-140, 394). On April 23, 1956, the rival union filed a representation petition with the Board, in contravention of its rules, which the Board later dismissed (R. 139-140).

On June 11, 1956, the union called upon all of the employees to pay their union initiation fees and dues within ten days "or to make arrangements for same," otherwise the union would have to request the Petitioner to terminate their employment under the agreement (R. 359). There was default to Local 1575, as stated, since Local 1674 was merged into it in 1954, and by revoking the check-off in favor of I.L.A. District Council the employees were in default to it (R. 76-77).

A delegation of the employees, led by Falu Rosario, Amariles and five others (who had not only themselves refused to pay dues but had counselled and advised the other employees to refuse to pay their dues) thereupon informed union leader Moreno and the Petitioner that they would pay dues but not the required initiation fee (R. 243-244). Moreno refused the offer (R. 32-33, 45).

Accordingly, the union on June 25, 1956, requested the Petitioner to discharge seven named employees (R. 77). On June 28, 1956 the Petitioner wrote to each of the employees, informing each of the communication, and stated that unless the employees "make pertinent arrangements" with the union, by June 30, 1956, they would be discharged (R. 362).

They made no effort to make such arrangements. Instead they conferred with the rival union and its attorney (R. 143), and on July 2, 1956, they sent to

the Petitioner a letter dated June 29, 1956 in which the employees stated that they would refuse to pay dues to the union until the National Labor Relations Board decided that they must do so. They referred to the representation petition filed with the Board by the rival union (which the Board, as stated, later dismissed), and stated that any action taken by the Petitioner would be at its own risk, though an employee of the Board had repeatedly warned them that they were obliged to pay their union dues (R. 375).

They (i.e., Falu Rosario, Amariles and their associates) did much more than this. They caused the employees to strike in protest against the required payment of union dues (R. 248), and when the union sought to supply replacements for the strikers under its contractual obligation to the Petitioner, the Rosario-Amariles group incited a riot which the police quelled. Petitioner was obliged to close down the dry dock (R. 248-252).

In the circumstances of this strife, the Petitioner engaged in efforts to compose the dispute, which resulted in a written stipulation dated July 6, 1956, signed by Falu Rosario and other employees, by which they agreed to pay up their debts to the union (R. 365-366).

The employees in question nevertheless failed to meet their obligations to the union, made repeated semi-weekly or weekly appointments with Moreno to meet him at union headquarters to pay their dues but instead converted these meetings into vehicles for discussion rather than payment (R. 98, 103), and rejected a compromise proposal by Moreno for payment of their obligation in modest installments

(R. 391). Consequently, on July 23, 1956, the Union requested the Petitioner to discharge the eleven employees involved in this proceeding (R. 367-368).

In response to the union's request, Pena, the auditor of the Petitioner who participated in its labor relations, "made a last effort to have these men try to bring the matter through the grievance committee" (R. 263). He made a suggestion for such purpose to Falu Rosario, who rejected it (R. 264). Upon the advice of its attorneys (R. 264), Petitioner then caused an inquiry to be held on July 31, 1956 (R. 360) and a written transcript of the statements given at the inquiry to be made by an independent public stenographer (R. 266), for the purpose of verifying the exact situation (R. 369). The statements given at the inquiry showed that the employees in question were agreeable to paying dues but refused to pay the required initiation fee. All employees agreed that the sole problem had to do with dues and initiation fees. No employee charged that his sought-for discharge was on account of rival unionism or engaging in a strike in breach of agreement, or refusal to recognize the agreement, or any other reason unconnected with dues or initiation fees (R. 369-380).

After receiving the advice of its attorney (R. 267), the Petitioner on August 3, 1956 discharged the eleven employees in compliance with the union's request (R. 380-381). All the other employees then agreed to pay their initiation fee and dues according to the arrangement which Moreno had offered to the discharged employees but which they rejected (R. 297, 388).

### A. The Trial Examiner's Findings

Except for employees Arroyo and Reyes, the trial examiner found that the Petitioner did not violate the Act in discharging the employees (R. 37-39).

In his Concluding Findings the trial examiner broke the issues down to two questions (R. 32-35).

1. Whether failure to pay union initiation fees and dues or some other reason prompted the union to request the discharge and the Petitioner to discharge the eleven employees. The trial examiner found for the union and the Petitioner, and against all eleven employees, on this question.[2]

2. Whether the demand for initiation fee of $75 by the union was excessive and discriminatory. On this question the trial examiner found for the union and the Petitioner and against nine of the eleven employees, but in favor of the two employees Arroyo and Reyes (R. 32).

The findings of the trial examiner in favor of Arroyo and Reyes are made in two brief paragraphs in the trial examiner's report (R. 34-35).

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[2] The trial examiner stated:

> "Insofar as the Respondent Company is concerned, I am convinced and find from a preponderance of the evidence and the entire record in the case that the sole motive in discharging all of said employees was to comply with the union shop clause in the contract because of their alleged failure to affiliate with Respondent Union" (R. 32).

And, as concerned the Union, the trial examiner stated:

> "With respect to the Respondent Union, I am convinced and find from a preponderance of the evidence that notwithstanding their activities on behalf of a rival union, the request for discharge of 11 employees was based solely on their refusal to pay an initiation fee of $75 and monthly dues to its constituent Local Union 1575" (R. 32-33).

As to Arroyo, the finding of the trial examiner is that because he had been a member of one local (ILA Local 1889), of the union, he should not have been required to pay an initiation fee on becoming a member of Local 1575, which he was required to join under the April 9, 1956 agreement (R. 34). It was, the trial examiner found, "unreasonable, excessive and discriminatory" for the union to demand of Arroyo exactly the same initiation fee demanded of the others (R. 34).

As to William Aquino Reyes, the trial examiner's conclusion is based on the finding that he tendered the requested initiation fee and dues to Moreno but Moreno rejected the tender (R. 34-35). The tender, while made before his discharge, was made after the July 23rd letter requesting his discharge (R. 221, 223).

We summarize the trial examiner's findings: As to all eleven employees, their discharge was sought by the Union and they were discharged by the Petitioner not because of their rival unionism or for any other reason but solely because of their failure to pay their required union initiation fee and dues. In the case of Arroyo, however, the request that he pay an initiation fee was "unreasonable, excessive and discriminatory" because of his membership in another local of the same union. And Reyes' discharge was improper because, subsequent to the union's request that he be discharged but prior to his discharge he tendered to the union the required initiation fee and dues which the union rejected.

### B. The Board's Findings and Decision

The Board wholly reversed the trial examiner's findings and the dismissal of the complaint as to the nine employees, and substituted its own findings as to

all eleven employees (R. 45-57). The Board, contrary to the trial examiner, found that the union had requested the discharge of these employees and the Petitioner discharged them, for reasons other than their failure to pay their union initiation fee and dues. It is not entirely clear whether these "other reasons" specified by the Board had to do with the employees' rival unionism, their leadership of an illegal strike, or both.

The Board, notwithstanding that it did not conduct the hearing required by the Act, and did not have an opportunity to see the witnesses, observe their demeanor, and evaluate their oral testimony in light of the whole record, reversed the trial examiner's findings on two main grounds: (1) certain testimony by Falu Rosario and his confederate Rivera Amariles, which the Board isolated and read out of context, without giving any consideration whatever to the record considered as a whole, and to the fact that the trial examiner discredited these witnesses; (2) certain written statements allegedly made by union leaders Moreno and Ortiz which the Board similarly isolated and tore out of context, notwithstanding that the trial examiner credited their testimony and made findings on the whole record.

**The testimony of Falu Rosario and Rivera Amariles**

The Board based its reversal of the trial examiner's findings partly on the testimony of employees Falu Rosario and Rivera Amariles, that after the union requested the Petitioner to discharge them but before their discharge, several of the employees were called into the Petitioner's office and were told by Moreno in the presence and with the approval of officers of

the Petitioner that if the employees would terminate their activities on behalf of the rival union, the payment of the initiation fee would be foregone.

The Board referred to this testimony by Falu Rosario as "uncontradicted" and stated that the testimony by his confederate Rivera Amariles "corroborated" the testimony given by Falu Rosario (R. 48). One would think at the outset, from reading the Board's reference to the alleged "uncontradicted" character of Falu Rosario's testimony, that the law requires the trial examiner, or the Board, or the courts, to accept uncontradicted testimony at its face value. The rule of law, as we know, is just the opposite, as the Board knows and has urged in other cases, for example *N.L.R.B.* v. *J. C. Hutton Handle Factory*, 8th Cir., 255 F.(2d) 697, where the Court said: "The Board as the trier of the facts, was not compelled to accept at its face value the testimony of the petitioner, a highly interested witness, even though it was uncontradicted." Falu Rosario and Amariles, as we shall see, were highly interested witnesses, they were the charging parties in the Board proceeding and were the leaders of the discredited confederation to welch on their obligation to pay union initiation fee and dues.

Again at the outset, the Board is inaccurate in stating in its opinion that Falu Rosario's testimony was "uncontradicted." It was contradicted by the whole record. It was also specifically contradicted (1) in Moreno's testimony that in all of his conferences with the Petitioner and the employees he limited his request for their discharge to the ground of their nonpayment of their union dues under the union security clause, "nothing but that," and "nothing else"

(R. 119); (2) in Pena's testimony that in all conversations with employees the sole matter under discussion was the payment and satisfaction of their union indebtedness (R. 261).

The trial examiner, as evidenced by his specific findings which contradict their testimony, obviously disbelieved this testimony given by the discredited ringleaders (not corroborated by the other employees allegedly at the meeting), and he did so on the whole record.

The Board, however, without examining the glaring detractions from the credibility of Falu Rosario and Amariles to which we will advert and which we will detail below, felt free to refer to their testimony as "undisputed" and to the testimony of Falu Rosario as "corroborated" by the testimony of Amariles.

Falu Rosario and Amariles were the two top leaders of the confederation to refuse paying initiation fees and dues to the union (R. 132, 142-143, 174, 184, 309, 365, 375).

They were the leading signers of the union's deceitful letter of July 2, 1956 (R. 364), in which they stated that they would refuse to pay their required initiation fee and dues until the Board directed them to do so, although they knew (R. 375) that this was a false position to take because they had been warned by an employee of the Board at its regional office that they were obliged to pay their indebtedness until another union was certified.

They were leaders of the illegal work stoppage called to protest the payment of the required dues (R. 147). The evasiveness of Falu Rosario's testimony may be seen from his answer to the question

whether he called the workers out on strike. "No," he replied, "I did not call them out, they went out behind us." (R. 147). They were two of the six employees who signed the stipulation of July 6, 1956, by which they agreed to mend their ways and pay up their union debts (R. 155).

Finally, they and they alone were the two persons who filed the charges with the Board which eventuated in this proceeding.

Now we turn to the statements which they gave at the inquiry held by the Petitioner on July 31, 1956 in response to the union's request of July 23, 1956, that the employees in question be discharged. The employees sought to be discharged by the union were present and were given an opportunity to be heard (R. 369-380).

Both Falu Rosario and Rivera Amariles, stated repeatedly at this inquiry that their sole difference with Moreno was over the payment of their union dues and initiation fee (R. 370-380).

The Board, interestingly enough, does not in its opinion state when the alleged conversation in question testified to by Falu Rosario and "corroborated" by his confederate Amariles was held. Falu Rosario testified at the hearing before the trial examiner that the alleged conversation was held prior to the July 31, 1956, inquiry which the Petitioner, as stated, held in response to the union's discharge request of July 23, 1956. Yet, at the July 31, 1956, inquiry all of the employees, including Falu Rosario and Amariles, stated that the question between them and the union had to do solely with dues and initiation fees.

Any possible doubt that Falu Rosario was an outright liar and was regarded by the trial examiner as such may be seen from the evidence in the record having to do with the dissolution of Local 1674 and its merger into Local 1575. This, Moreno testified, took place in 1954, at a special meeting of Local 1575 held for the purpose of approving the consolidation (R. 64-69). The written minutes of the meeting are in evidence (R. 416). Falu Rosario, on the other hand, testified that he never knew of such a meeting, and never received any notice of it (R. 127). He even went so far as to state, in response to question addressed to him by the trial examiner whether he ever attended a meeting of Local 1575 "at anytime"—"Never." This was his testimony: He "never" attended a meeting of Local 1575.

The fact is that he attended a meeting of Local 1575 on November 13, 1954, at which he was elected a delegate. The minutes of the meeting are in evidence (Union's Exhibit No. 2A; R. 418). They show that "Fellow Member Falu spoke giving thanks for his appointment and among other things said he would give full support to Local 1575" (R. 419). Falu Rosario shortly thereafter visited Pena, auditor of the Petitioner who participated in the Petitioner's labor relations, and informed Pena that Local 1575 had taken over Local 1674 and that he (Falu Rosario) had been elected a delegate of Local 1575 (R. 230, 271). In fact, Falu Rosario dealt with the Petitioner as delegate of Local 1575 (R. 272).

The trial examiner accepted the Moreno and Pena testimony and the minutes of the meeting, and thereby rejected Falu Rosario's testimony as untruthful (R. 13-14). Also rejected is Amariles' testimony that

the first time he heard he was being "transferred" to Local 1575 was in 1956 (R. 171). And to cap the matter, (1) the 1954 collective bargaining agreement between the Petitioner and the union, under which Falu Rosario and Amariles and the other employees worked and which gave them benefits and protection, was signed by Ortiz as President of Local 1575 (R. 341), and (2) the union meeting for consolidating Locals 1674 and 1575 was held pursuant to a merger resolution adopted by the I.L.A. District Council in March, 1954, and reference was made to this merger resolution by the Board in its decision in Volume 111 of its reports, beginning at p. 599, one of the cases out of which the election resulted which caused the union to be certified as the bargaining representative of the employees in the case at bar (R. 11, 322).

This is the witness (Falu Rosario), whom the trial examiner wholly disbelieved and for good reasons, but whom the Board blandly accepts and credits.

**Moreno-Ortiz' written statements**

The second main ground upon which the Board reversed the trial examiner's findings derived from two extra-judicial and after-the-event statements made by union leaders Moreno and Ortiz, the first a letter dated August 3, 1956, sent by the union to each of the dischargees on August 10, 1956 (R. 386-387), the second an affidavit signed by Moreno and Ortiz, allegedly given on November 13, 1956 to a Board field examiner (R. 389-390). In these statements it was allegedly indicated that the discharge of the employees, or their expulsion from the union, or refusal to readmit them into the union, was sought either partly or solely because of their participation in an illegal work

stoppage and violence in violation of the collective bargaining agreement between the union and the Petitioner. Both statements were made after the employees were discharged.

These statements were introduced in evidence by counsel for the General Counsel for the purpose of impeaching the credibility of Moreno and Ortiz, and constitute at most an admission against interest. The Board, nevertheless, gave these statements the status of a found fact, notwithstanding that the trial examiner found for Moreno and Ortiz on the issue of their credibility, and the facts found by the trial examiner on the whole record are to the contrary.

Ortiz explained the letter of August 3rd as a declaration of the union's internal administrative policies (R. 114). Because of their actions, particularly their participation in an illegal strike, the union did not want to readmit the discharged employees in question as members. This right to fix the conditions for union membership, the union unquestionably has under the express language of the proviso to Section 8(b)(1)(A) of the Act. But, insofar as the discharge of these employees was sought, it was sought solely on account of their nonpayment of their union indebtedness (R. 101). This in substance was the testimony which Moreno and Ortiz repeatedly gave in clarification of the letter of August 3, 1956 (R. 78, 81, 97, 99, 102, 110) and which the trial examiner evaluated on the whole record which showed among other things the patience and indulgence and efforts at settlement which the union engaged in for inducing the employees to satisfy their union indebtedness. The Board makes not a single

reference to all this testimony and evidence in the record.

Moreno and Ortiz similarly explained the November 13 affidavit. They testified that it was only part of the statements given to the Board's regional attorneys, and inaccurate at that. They signed the affidavit without reading it (R. 100, 112, 113), in the hubbub of a meeting at the Board's regional offices (R. 112). Ortiz specifically denied that he made the statements contained in the affidavit (R. 111), and reconstructed the facts and the background against which he signed the affidavit without reading it (R. 111). Ortiz had informed the Board representative then and prior to that time that the nonpayment of required union initiation fee and dues was the sole reason for the request that the Petitioner discharge the employees in question (R. 110). Indeed, the record shows that the Board at its regional office was kept informed of the controversy from the beginning and knew that this was so, knew that the employees' total activities were aimed at getting away with their persistent refusal to pay their union initiation fee and dues (R. 255, 256, 375), and knew that the employees deceitfully notified the Petitioner that the Board had indicated that they were not obliged to pay their union initiation fee and dues while their legally baseless (and later dismissed) representation petition was pending (R. 375). The assailed November 13 affidavit was prepared by Canella, employed by the Board at its regional office (R. 101). Canella was not called as a witness to contradict the testimony of Moreno and Ortiz as to the circumstances under which the affidavit was signed or the whole picture of which the affidavit was a part.

As in connection with the August 3 letter, the November 13 affidavit was obviously part of, and had to be read in the context of, the distinction which the union drew between its right to govern its internal affairs and the right to request the discharge of employees for failure to comply with their union obligations. The former was governed solely by the union's constitution and by-laws and was otherwise not substantially limited as to subject matter; indeed, as stated, under the clear language of the proviso to Section 8(b)(1)(A) of the Act ("Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein"), the union has a right to govern its internal affairs.

The latter, by contrast, is limited by the Act: The union may not seek the discharge of employees for their failure to comply with their union obligations except in one instance, viz., where the failure is to pay union initiation fee and dues under a union shop agreement.

The trial examiner, as the hearing officer, had the task of probing this distinction and the evidence which supported the competing contentions in the case. In contrast to the Board's action, the trial examiner's conclusion was based on the testimony and demeanor of Moreno and Ortiz, and upon the whole record. The August 3 letter and the November 13 affidavit were parts of the record. They could not be considered in isolation. Yet this is exactly what the Board has done. And based on this isolated reading, without the slightest regard for all the countervailing evidence in the case, the Board has reversed the trial examiner's findings. In doing so, the Board discredits

the testimony of Moreno and Ortiz, whereas the trial examiner credited their testimony after observing their conduct and demeanor at the hearing.

Concededly there was an effort by some of the employees to bring in a rival union, and a strike in breach of agreement followed by violence provoked by Falu Rosario, Rivera Amariles and their associates. But it is also abundantly clear that all this was done to avoid the payment of properly required union initiation fees and dues. It would be absurd to contend that Moreno (or any human being in his position) could have been indifferent to the rival unionism or to the illegal work stoppage which breached the no-strike guarantee in the collective bargaining agreement to which he was a signatory. But the damnable fact remains that all this was done by the employees to avoid the payment of their union indebtedness, as is further evidenced by their revocation of the checkoff authorization, and it was solely the payment of the union indebtedness which Moreno, and the Union in whose behalf he acted, sought to enforce.

Moreno testified repeatedly at the hearing before the trial examiner that the failure to pay dues, not anything else, was the reason for his request that the employees be discharged (R. 73, 78, 81, 99, 119), and he further testified unequivocally that had the employees tendered the required initiation fee and dues he would have accepted them (R. 97). His testimony is supported by the numerous instances of indulgence which he permitted for the purpose of giving the employees an opportunity to satisfy their union indebtedness. He met with them for this purpose about sixty times (R. 97), and agreed at the Petitioner's request to give them "another chance" to pay their

dues (R. 98, 103, 116). He offered to accept the union initiation fee and dues in modest instalments. But the employees even rejected this. How can the Moreno-Ortiz challenged after-the-events statements be given the effect which the Board gives to them in all of the circumstances which the whole record discloses?

When Moreno was faced with the concerted refusal to pay dues, he had to take action to enforce the union shop clause in the agreement. The employees in question not only refused to pay, but deceitfully and effectively counselled and advised the other employees not to pay. He called for the discharge of these employees, and the fact that all the other employees satisfied their obligations to the Union after these employees were discharged shows that his judgment was correct.

**Alleged futility of tendering initiation fees and dues**

The nine employees in question are thus found by the Board to have been discharged in violation of the Act though concededly they refused to pay properly required union initiation fees and dues under an admittedly valid union shop clause of a collective bargaining agreement.

But the Board purported to find that it would have been futile for these employees to tender the initiation fees and dues—the tender would presumably have been rejected, witness what happened, said the Board, in the cases of employees Arroyo and Reyes.

This finding of the Board is based on a patent misreading of the trial examiner's express findings. His

findings as to Arroyo and Reyes were based not on any general ground applicable to all eleven employees but on what he believed were special facts applicable solely to Arroyo and Reyes—to Arroyo, because of his membership in a sister local of the international union, and to Reyes, because he made tender after his discharge was requested by the union, but before his discharge by the employer, the Petitioner herein.

There is not a shred of evidence in the case, nor a word of support, in the trial examiner's findings that Arroyo's membership in a sister local relieved him of the obligation to pay the required initiation fee and dues. The history and practices of American labor unions afford scant support for such a generalization without supporting evidence in a specific case. And as to Reyes, the uniform course of judicial decision denies that an employee may cure his default by tendering his initiation fee and dues after his discharge has been requested.[3]

The Petitioner, for reasons of its own, did not file exceptions with the Board to the trial examiner's findings as to Arroyo and Reyes, and we do not seek review of these findings. Our point, rather, is that the Board extended these special findings as to Arroyo and Reyes into a different general conclusion, without any warrant whatever in the record, in the teeth of the trial examiner's findings that all employees were

[3] International Association of Machinists v. N.L.R.B., 2nd Cir., 247 F. (2d) 414; Cunningham v. Erie Railroad Company, 2nd Cir., 266 F. (2d) 411 (under identical provision of the Railway Labor Act); N.L.R.B. v. Technicolor Motion Pictures Corp., 9th Cir., 248 F. (2d) 348. "The necessity for an effective union sanction to discourage 'free riders' and the prejudice to the orderly administration of internal union affairs underlay these decisions." Cunningham v. Erie Railroad, supra.

discharged for non-payment of initiation fees and union dues, not for any other reason.

This misreading by the Board of the trial examiner's special findings as to Arroyo and Reyes should not, it is submitted, detract from our contention that the Board's reversal of the trial examiner's findings as to the nine employees repudiates his findings on credibility, in disregard of the mandate of this Court in the *Universal Camera* case. This is fortified by the testimony of union leader Moreno earlier referred to, which the trial examiner believed, as to Moreno's repeated meetings with the employees in question to get them to pay their initiation fee and dues, their repeated refusals, and their rejection of Moreno's offer to accept payment of their obligations in instalments.

**Reason for selecting the employees in question for discharge**

When union leader Moreno was asked at the hearing before the trial examiner why he had selected the employees in question for discharge, he replied that they were the "seven braves, they were the braves of Boston . . . they were the only ones who spread dissension among the full 100, so I did not see any good will in them, they did not cooperate and do things right" (R. 50-51).

The Board, in interpreting this testimony, stated that it "could only have reference to the activities undertaken by the employees on behalf of the rival labor organization" (R. 51). In so doing, the Board rejected the contrary finding of the trial examiner who alone had the opportunity to observe Moreno's demeanor as a witness, to weigh all of his testimony and not simply the words quoted by the Board, and pass on his credibility. The trial examiner who lived

with the case found, through this process, that the employees were discharged not because of their activities on behalf of a rival labor organization but because of their persistent failure and refusal to pay their properly required union initiation fee and dues. They not only did this, but fraudulently and effectively counselled and advised all the other employees to do likewise.

### C. The Decision of the Court Below

The court below, Judge Bastian dissenting, affirmed the Board's order. In essence, the court in its opinion stated: "The crucial considerations were not considerations of demeanor but rather rested upon certain oral factual testimony which was undisputed, and upon letters, notices, and a transcript of a conference". The court did not state what it meant by "oral factual testimony" which does not involve "considerations of demeanor".

The court stated that the question in the case was: "What was the real reason for the discharges?" In affirming the Board's order, the court took the view that the Board had the right to decide that the eleven employees in question were picked out for the initial test under the union shop agreement because of their leadership of the rival union effort. We would point out that there is no specific evidence in the case linking all of the eleven employees to leadership of the rival union effort, but the evidence at all events is clear that these eleven employees were leaders in the (successful) effort to induce all of the approximately 100 employees in the establishment to refuse to pay their union initiation fees and dues.

## REASONS FOR GRANTING THE WRIT

### A. As to the Failure to Comply With the Mandate of the Universal Camera Case

1. The question raised by the Board's reversal of the trial examiner's findings, and the affirmance by the court below of the Board's order, is of major importance in the administration of the Act. The mandate of this Court in the *Universal Camera* case was disregarded by the Board and by the court below when, without taking account of the whole record and the clear preponderance of the evidence which supported the trial examiner's findings, the trial examiner's findings were reversed solely by crediting the testimony and evidence of witnesses wholly discredited by the trial examiner, and by discrediting the testimony of witnesses credited by the trial examiner.

2. In the opinion of the court below it is stated that the "crucial considerations were not considerations of demeanor" but "upon letters, notices, and a transcript of a conference". The only two written documents upon which the Board relied were the Union's (Moreno-Ortiz) letter of August 3, 1956, and the Union's (also Moreno-Ortiz) affidavit of November 13, 1956. The mandate of the *Universal Camera* case would mean nothing if these statements, introduced by Board's counsel at the hearing before the Trial Examiner solely as admissions to impeach their credibility, could be given the effect of a found fact by the Board or by the court below notwithstanding the trial examiner's contrary finding on the whole record—after the trial examiner, observing Moreno and Ortiz at the hearing, found in favor of their credibility on the basis of their testimony and their demeanor and the whole record.

The Moreno-Ortiz written statements were offered in evidence by counsel for the General Counsel in the course of examining Moreno and Ortiz as adverse parties under Rule 43-B of the Federal Rules of Civil Procedure (R. 104-105). At most, therefore, these statements can be regarded as admissions against interest for the purpose of impeaching the credibility of Moreno and Ortiz. *N.L.R.B.* v. *Quest Shoe Mark Brassiere Co., Inc.*, 2nd Cir., 185 F.(2d) 285. The written statements cannot be treated per se as an affirmative fact. In the course of examining Ortiz, counsel for the General Counsel conceded that the November 13 affidavit was offered as an admission against interest and for the purpose of seeking to impeach the credibility of Ortiz as a witness (R. 108). There was no effort made to establish by evidence the facts allegedly stated in the affidavit. Yet this is exactly what the Board has done in this case, notwithstanding that the Trial Examiner found for Moreno and Ortiz on the issue of credibility. This, we submit, was error. The Board committed identical error in *N.L.R.B.* v. *Local 160, International Hod Carriers, Etc. Union*, 7th Cir., 268 F.(2d) 185, which reversed the Board's decision largely because of this error.

3. This Court in the *Universal Camera* case held that there must be an end to the practice of the Board and of some courts by which evidence on one side of the case was made the basis of a decision which fails to take into account the evidence in the whole record which detracts from it. 340 U.S., at p. 481.

The Board in the case at bar acted as though the *Universal Camera* case was never decided. This is true both in the evaluation of Fa[illegible]sario's testimony

and in the weighing of Moreno's and Ortiz's alleged written statements in light of their testimony.

Falu Rosario's testimony is characterized as "uncontradicted", and the Board chose to believe it because it was (as the Board said) "corroborated" by his confederate Rivera Amariles, despite the glaring facts in the whole record which detract from the credibility both of Falu Rosario and Rivera Amariles, whose evasive conduct and demeanor on the witness stand the trial examiner had the opportunity (but the Board did not) to observe. Both of these employees had the onus at the hearing of trying to justify their discredited activities to approximately 100 employees whom they had misled into believing they could get away with failure to pay their required union initiation dues. They counselled the employees to revoke their check-off of I.L.A. District Council dues, they advised the employees they could safely ignore the Union's letter of June 11 in which the employees were asked to pay their dues, they deceitfully wrote to the Petitioner (in disregard of a contrary warning by an employee of the Board) that the employees were not obliged to pay their dues to the Union until told to do so by the Board, they provoked an illegal strike to enforce their welching on their union indebtedness, and thereafter refused to pay this indebtedness though they promised to do so in writing.

Falu Rosario lied when he testified he did not know about the existence of Local 1575 until 1956, when in fact he was elected a delegate of Local 1575 in 1954, pledged his loyalty to it, and represented it in dealing with the Petitioner in 1955. And both Falu Rosario and Amariles, who had 'promised in writing on

July 6, 1956, to pay their union dues, bedeviled Moreno with about 60 meetings which they attended presumably to pay their dues but actually to argue, even to the point of rejecting Moreno's compromise offer to accept their initiation fee and dues in modest instalments.

All of this appears in the record. Not a single word about it appears in the Board's opinion. Don't pick and choose, said this court to the Board and to the courts in the *Universal Camera* case, *supra*. If you believe a fact has weight, examine it in light of the whole record before you reach a decision, weighing the fact selected against all the evidence in the whole record which detracts from it. The Board in the case at bar has ignored both the record and the command of the Supreme Court in the *Universal Camera* case.

The same can be said regarding the Board's cavalier treatment of the Moreno-Ortiz written statements. They are ambiguous and puzzling, made after the event. The whole record clarifies them, places them in proper perspective. The Board, by contrast, reads them in isolation, finds them clear and unambiguous and ignores the whole record to the contrary, including the testimony of Moreno and Ortiz. Their testimony, although not impeached, is not to be believed, but Faln Rosario and Rivera Amarilos must be believed despite the awful detractions in the record which rip their credibility to pieces!

4. The strongest statements made in the *Universal Camera* decision, *supra*, on the subject of administrative finality have to do with situations in which the Board reverses a finding made by a trial examiner. The Board's right to reverse exists, but its exercise

would have to take three things into account: (1) The greater status contemplated for trial examiners both by the Act and the Administrative Procedure Act, which have identical purposes; (2) the advantage which the trial examiner has in the evaluation of conflicting testimony because he sees the witnesses and has an opportunity to observe their conduct and demeanor; (3) the whole record.

Can it be said, can it be said even remotely, that the Board's decision in the case at bar took any of these three required things into account in reversing the trial examiner?

In giving credence to the testimony of Falu Rosario and Rivera Amariles, the Board which had no opportunity to see these witnesses and study their demeanor chose to repudiate the trial examiner who had these opportunities and wholly discredited their testimony, and the Board did so on their isolated testimony without regard to the whole record.

Comparably, in giving isolated credence to the Moreno-Ortiz statements of August 3 and November 13, the Board wholly ignored the clarifying testimony of Moreno and Ortiz which the trial examiner believed, as well as the whole record which the trial examiner weighed and evaluated in reaching his conclusion.

One reads the Board's opinion in the case at bar, with its reversal of the trial examiner, as a belittling and disparagement of the trial examiner and the hearing process in which, under the Act and the Administrative Procedure Act, the trial examiner plays an increasingly important role.

5. This is not a case where, on facts found by the trial examiner, the Board reaches different conclusions. On the contrary, the Board rips the trial examiner's findings apart and finds contrary to the trial examiner on the basis of fragmentary oral testimony and evidence which the trial examiner rejected upon the basis of his findings on credibility.

**B. As to the Selection of Employees for Discharge Under a Union Shop Agreement**

6. The novel question as to the union's right to select for discharge those employees who not only refuse to pay their own initiation fees and dues under a union shop agreement but also counsel and advise all the other employees in the bargaining unit to do likewise, is of major importance in the administration of the Act and in the conduct of labor-management relations generally.

The Board and the court below denied to the union the right to make such a selection, but any other course of action would result in substantial unemployment and hardship, and shut-down of the Petitioner's operations. Suppose, for example, that four employees of the United States Steel Corporation were to do what the employees in the case at bar had done—would the Union be obliged to request the discharge of all of the possibly 50,000 or 100,000 employees in the bargaining unit? It is unthinkable that this type of massive plant shutdown is required by the Act. The Board, in the case of an illegal strike or other type of strike not protected by the Act, such as a strike in breach of a no-strike agreement, has held that it is lawful to discharge the strike leaders without discharging the participants in the strike. *Matter*

*of Kraft Foods Co.*, 108 N.L.R.B. 1164; *Matter of Stewart-Warner Corp.*, 94 N.L.R.B. 607. When the fact of default in the payment of dues is established, the Union's calling for the discharge of some but not all of the defaulting employees is desirable particularly where, as in the case at bar, its success in inducing the other employees to pay is a mark of good judgment. "The natural inference is that the union is empowered to enforce its dues requirements with common sense, making allowances and concessions where need be." *Cunningham* v. *The Erie Railroad Company*, 2nd Cir., 266 F.(2d) 411.

7. The court below, while stating in its opinion that there might be some sense to a union's selection of some of the employees for discharge "to demonstrate the seriousness of its requirements", also stated: "But in this case the union picked out for this initial test the eleven who were the leaders of the rival union effort." Why, the court asked, these eleven? Because, according to the record and the findings of the trial examiner, they not only refused to pay but effectively counselled and advised the others to do likewise, employing deceitful means for this purpose. The finding of the Board and of the court below that they were discharged for rival union activity is, as we have shown, based on outright disregard of the mandate of this Court in the *Universal Camera* case.

8. By engaging in dual unionism, an employee does not free himself from the lawful requirements of a valid union shop agreement, nor does it immunize him against discharge for failure to pay his union dues. Yet this is precisely the effect of the decision of the Board and the court below in this case.

## CONCLUSION

For the reasons stated, this petition for certiorari should be granted.

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# APPENDIX

## APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 15263

PUERTO RICO DRYDOCK & MARINE TERMINALS, INC., *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

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No. 15296

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

ILA DISTRICT COUNCIL OF THE PORTS OF PUERTO RICO, ILA, IND., and LOCAL 1575, ILA DISTRICT COUNCIL OF THE PORTS OF PUERTO RICO, ILA, IND., *Respondents*

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On Petition to Review and Set Aside, and on Cross Petition to Enforce, an Order of the National Labor Relations Board

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Decided June 9, 1960

*Mr. Isidor E. Schlesinger*, with whom *Mr. Charles Patrick Clark* was on the brief, for petitioner in No. 15263. *Mr. Peter R. Cella, Jr.*, also entered an appearance for petitioner in No. 15263.

*Mr. Louis Schwartz*, Attorney, National Labor Relations Board, for respondent in No. 15263 and petitioner in No. 15296. *Mr. Thomas J. McDermott*, Associate General Counsel, National Labor Relations Board, *Mr. Marcel*

*Mallet-Prevost*, Assistant General Counsel, National Labor Relations Board, and *Messrs. Melvin Pollack* and *Richard H. Frank*, Attorneys, National Labor Relations Board, were on the brief for respondent in No. 15263 and petitioner in No. 15296.

*Mr. William B. Mischo*, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of court, for respondents in No. 15296.

Before PRETTYMAN, Chief Judge, and BASTIAN and BURGER, Circuit Judges.

PRETTYMAN, *Chief Judge:* These proceedings concern an order of the Labor Board involving the discharge of eleven employees of the petitioner company. The Board found the request for the discharge and the discharge to be in violation of Section 8(a)(1), (a)(3), (b)(1)(A), and (b)(2) of the Act.[1] It ordered the company and the union to cease and desist from the activities of which complaint had been made, and also to reinstate the discharged employees. The company petitioned for review, and the Board filed an answer and cross application for enforcement against it (the company). That proceeding is here as No. 15263. The Board also filed a petition for enforcement of its order against the union. That petition is here as No. 15296.

The District Council named as respondent here is the representative of the International Longshoremen's Association of Puerto Rico, which in turn is affiliated with the International Longshoremen's Association, Independent. Various local unions are affiliated with and constituent parts of the former and thus are supervised and controlled by the District Council. Among these locals were Local 1575 and Local 1674. Prior to 1954 Local 1575 represented stevedores, and Local 1674 represented clerks and maintenance employees, throughout the island. Dissension arose

[1] Taft-Hartley Act, 61 STAT. 140 (1947), 29 U.S.C. § 158 (a)(1), (a)(3), (b)(1)(A), (b)(2) (1958).

in Local 1674, and by February, 1954, it had become entirely inactive. At about that time, in a Board-conducted election, employees of the company expressed their desire to be represented in a separate, single-employer unit. The Board certified the District Council as the representative of a bargaining unit composed of approximately 100 of the company's drydock workers, all of whom were engaged in maintenance work. The District Council and the company entered into a written agreement. That agreement did not contain a union-shop clause, but did contain a check-off provision. Shortly thereafter, in July, 1954, Local 1575, held a special meeting, to which the drydock employees of the company were invited. The President of the District Council proposed that the remaining members of the then inactive Local 1674 be consolidated with Local 1575 upon payment of the same monthly dues they had been paying to Local 1674. Very few accepted this proposal, and from 1954 to 1956 very few employees in the bargaining unit paid dues to any District Council affiliate.

In the early months of 1956 the bargaining agreement was renegotiated. A union-shop clause, requiring affiliation with the union after thirty days of employment, was to be included as part of the new agreement. On the morning of April 9, 1956, the employees learned that the wage increases provided in the new contract were not to be retroactive to January 1, 1956, as they had expected. The employees held a meeting and protested both to the District Council and to the company. They also conferred with representatives of a rival union. This rival union was UTM District Council No. 15, which was an AFL-CIO affiliate. Nevertheless the District Council and the company executed the new agreement. On April 11th approximately 100 employees in the bargaining unit filed written notices revoking their consent to the dues check-off in favor of the District Council. By telegram on that same day certain workers, purporting to act on behalf of all the workers in the unit, repudiated the April 9th contract and demanded

that the company receive a delegation of workers. On April 21st approximately 55 workers, in a telegram to the company, repudiated the contract and authorized the rival AFL-CIO local to represent them in collective bargaining. The company took the position that, since the District Council had been certified by the Board, it (the company) was compelled to negotiate with that union.

In June, 1956, the District Council wrote a letter to each member of the bargaining unit, calling attention to the union-shop clause, to the fact that the union had waited sixty days before reminding employees of their obligations to the union, and formally requesting them to pay the dues in arrears within ten days. The letter stated: "The initiation fee is $75.00 and the monthly dues is $2.00." The letter notified the employees that, if within the specified period they had failed to make payment or to make arrangements for payment, "we shall regret having to request the Employer to terminate your employment." Thereupon a number of the drydock employees notified representatives of the District Council and of the company that they would pay the monthly dues but refused to pay an initiation fee because they had already paid an initiation fee to the then-inactive Local 1674. The District Council refused to accept the proposal, contending that since they had not paid dues for more than six months they had lost all their rights in the entire union, *i.e.*, in the affiliated group of which the District Council was the hub. Thereupon the union requested the company to discharge seven employees. An active and acute controversy ensued. There was a strike and a riot, and the company closed down the drydock. The seven dischargees were reinstated by the company pursuant to a stipulation which provided, *inter alia*, that the workers would pay their debts to the union. Conferences between the company and the employees followed, then conferences between the union and the employees, but the employees still refused to pay the initiation fee. They rejected a proposal by the President of the

District Council that the debts to the union be paid in installments. Finally the union again invoked the union-shop clause and requested the discharges of eleven employees. These employees were discharged.

Charges of unfair labor practices were filed, a complaint issued, and the controversy referred to a trial examiner of the Board. The trial examiner gave little, if any, weight to the facts regarding the efforts of certain of the employees to transfer representation to the AFL-CIO union. It was a fact that the employees who were discharged were the ringleaders in that movement. The trial examiner concluded that the discharges were because of the failure to pay union dues. From that finding it followed that since the union-shop clause was legal the requirement that the employees pay dues was legal and their discharges when they refused to pay were also legal. The Board, however, was more impressed with the force of the facts concerning the rival union activity. It pointed to certain somewhat dramatic incidents as being of great weight. Thus the Board called attention to a statement allegedly made by the President of the District Council to these employees that if they terminated their activities in behalf of the rival union the District Council would forego collection of the initiation fee. The Board also gave great weight to a letter which the District Council sent to each dischargee, stating various reasons for the discharge, referring to the work stoppage, etc., but not mentioning the dues dispute. The Board also considered as having high significance a written statement signed by the President of the District Council in which he said that the refusal of the dischargees to pay dues and initiation fees had nothing to do with the requests for their discharge.

Another circumstance which lends itself to the inference drawn by the Board from the whole record is the separate treatment accorded the eleven by the union. On July 21st the union offered to accept dues and fees from all the em-

ployees in installments, but all the employees rejected the offer. On July 23rd the union requested the discharge of the eleven. They were discharged on August 3rd, and their attempt immediately thereafter to accept the July 21st offer was refused by the union. Now, it is probably true that in such a situation, instead of requesting the discharge of all recalcitrants, which would have meant a shut-down of the plant, the union might properly proceed first by a sort of "pilot" step. That is, it might first request the discharge of a few employees in order to demonstrate the seriousness of its requirements. But in this case the union picked out for this initial test the eleven who were the leaders of the rival union effort. Why those eleven? A justifiable inference is that some consideration other than nonpayment of dues might have entered into the choice. Then, after the eleven had been discharged, the union on August 14th called a meeting of the remaining employees to receive "instructions" as to the payment of fees and dues. That notice, which was in writing, contained a clear warning of drastic steps to be taken against those who failed to attend. All these employees attended and agreed to pay up. The cleavage instituted by the union between the eleven and the others gives some additional support to the Board's ultimate finding that the eleven were discharged for reasons other than the failure to pay the dues and fees.

Thus the trial examiner and the Board differed as to which items of the evidence were of the greater weight and significance. The question, of course, was: What was the real reason for the discharges?[2] The trial examiner thought the real reason was the failure to pay the initiation fees; the Board thought the real reason was the rival union activity. The crucial considerations were not considerations of demeanor but rather rested upon certain oral

[2] See *e.g.*, National Labor Relations Board v. Mechanics Educational Society, 222 F. 2d 429 (6th Cir. 1955); National Labor Relations Board v. Local 169, Etc., 228 F. 2d 425 (3d Cir. 1955).

factual testimony which was undisputed, and upon letters, notices, and a transcript of a conference. There were bitter disputes as to truthfulness in some respects; for example, there was a bitter dispute about the circumstances of the signing of the statement by the President of the District Council above referred to. We cannot say that the conclusions of the Board were not supported by substantial evidence on the record as a whole, including the trial examiner's findings as part of that record. The Board did not ignore those findings; it referred to them, discussed the evidence, and differed with the examiner as to the conclusions—in the language of administrative agency adjudication called the "ultimate facts"—to be drawn from the evidentiary facts—the "basic facts". The Board's ultimate findings were rational, reasonable, and had support in the evidence as a whole, including the finding that the company "had reasonable grounds for believing that the Respondent Unions demanded the discharges here in question for reasons other than the failure of the employees to tender the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership." This was the Board's responsibility under the statute.

Two subsidiary points remain to be examined. The company urges that the case as to two of the eleven employees is different from that as to the remaining nine. The trial examiner, although finding for the company concerning the nine, held against the company as to the other two. For reasons sufficient to it, the company did not take exception to the examiner's findings concerning the two. We think the company is precluded by the clear language of the statute[3] from raising any points concerning the two. This

[3] 29 U.S.C. § 160(e): "* * * No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. * * *" The quoted passage is actually in Section 10(e) of the

is so regardless of whether the questions raised be considered questions of law, questions of fact, or mixed questions of fact and law.[4] The company relies upon *National Labor Relations Board* v. *Richards*[5] as establishing that the statutory proscription applies only to questions of fact and not to questions of law. But in that case the trial examiner's initial decision on the disputed point was in favor of the company, which was the ultimate respondent in the enforcement proceeding of the court. So the argument there, as the court pointed out, really was whether there existed an implied requirement for a motion before the Board for rehearing or to amend the judgment. We do not have that problem in the case before us.

The union objects to the broadness of paragraph II(1)(b) of the Board's order, which prohibits the union from interfering "In any other manner" with employee rights under Section 7 of the Act. We agree with the union's objection. There is no evidence in the record indicating that the union had ever been or was likely to be guilty of other types of unfair labor practices, some of which might constitute violations of Section 8(b)(1)(A) as well as the more specific

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statute, relating to enforcement proceedings. But Section 10(f), relating to review proceedings, refers specifically to the proceedings as provided in 10(e); and, moreover, the present case is before us not only upon a petition for review but also upon a cross-petition for enforcement. The courts seem to have treated the quoted language as applicable to both review and enforcement provisions.

[4] National Labor Relations Board v. Cheney Lumber Co., 327 U.S. 385, 388-389 (1946), and cases cited; National Labor Relations Board v. Associated Musicians, 226 F. 2d 900, 906-907 (2d Cir. 1955), *cert. denied*, 351 U.S. 962 (1956); National Labor Relations Board v. Pinkerton's Nat. Det. Agency, 202 F. 2d 230, 233 (9th Cir. 1953); West Texas Utilities Co. v. National Labor Relations Board, 87 U.S. App. D.C. 179, 184 F. 2d 233 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 939 (1951).

[5] 265 F. 2d 855, 862 (3d Cir. 1959).

sections of the Act, and thus the order must be modified.[6] Accordingly, paragraph II(1)(b) is modified to begin, "In like or related manner restraining or coercing employees * * *."[7] The second paragraph of the notice to be posted by the union will be similarly modified. The company has not objected to the scope of the order, nor has the union made any other objection to its scope.

*As modified, the Board's order will be enforced.*

BASTIAN, *Circuit Judge*, dissents in part, believing that the record as a whole supports the findings of the trial examiner and not those of the Board insofar as the nine employees are concerned. He agrees, however, that the company is precluded from raising any points concerning the two employees referred to in the opinion and, if the order of the Board is to be enforced, that it should be modified in the manner provided in the majority opinion.

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[6] The basic doctrine is stated in National Labor Relations Board v. Express Pub. Co., 312 U.S. 426, 437 (1941): "To justify an order restraining other violations it must appear that they bear some resemblance to that which the employer has committed or that danger of their commission in the future is to be anticipated from the course of his conduct in the past." See Morrison-Knudsen, Inc. v. National Labor Relations Board, 270 F. 2d 864 (9th Cir. 1959).

[7] This was the scope of the order recommended by the trial examiner. We therefore need not pass upon the Board's contention, urged upon us at oral argument, that the union cannot object to the scope of the order because it failed to object to the scope of the order recommended by the trial examiner. See National Labor Relations Board v. Lummus Co., 210 F. 2d 377 (5th Cir. 1954). The situation before us is thus not the same as that in Precision Fabricators v. National Labor Relations Board, 204 F. 2d 567 (2d Cir. 1953), where the Board had adopted verbatim the examiner's recommendation.